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Sierra Club v. U.S. Fish And Wildlife Service: The Phoenix Of Critical Habitat Designation

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*SIERRA CLUB v. U.S. FISH AND
WILDLIFE SERVICE:*
THE PHOENIX OF CRITICAL
HABITAT DESIGNATION

*Michael Fuller**

I. INTRODUCTION

In its March 2001 decision, *Sierra Club v. U.S. Fish and Wildlife Service*,¹ the U.S. Court of Appeals for the Fifth Circuit reversed a decision of the U.S. District Court for the Eastern District of Louisiana, which had granted the defendant U.S. Fish and Wildlife Service (Service) summary judgment. The Court of Appeals held that the Service's decision to not designate "critical habitat" was arbitrary and capricious.² The Fifth Circuit found that much of the Service's decision³ was based on a regulation⁴ that conflicted with the provisions of the Endangered Species Act.^{5,6} That regulation required consultation only when concerns for both recovery and survival of a threatened species were raised, while the Endangered Species Act required consultation if either recovery or survival was at issue.

This Note examines the Fifth Circuit's decision in *Sierra Club v. U.S. Fish and Wildlife Service* and determines that the Fifth Circuit reached the correct conclusion in light of the intentions underlying the Endangered Species Act. A review of recent court decisions show that courts are currently refusing to defer to agency decisions concerning critical habitat

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1. 245 F.3d 434 (5th Cir. 2001) [hereinafter *Sierra Club*].

2. *Id.* at 436.

3. Endangered and Threatened Wildlife and Plants; Decision on Designation of Critical Habitat for the Gulf Sturgeon, 63 Fed. Reg. 9967 (Feb. 27, 1998) [hereinafter *Gulf Sturgeon*].

4. 50 C.F.R. § 402 (2001).

5. 16 U.S.C. §§ 1531–1544 (1994).

6. *Id.* at 443.

designations, and instead are enforcing the intentions of Congress by holding that critical habitat designations are the rule, not the exception.

II. BACKGROUND

The sturgeon species has existed on the Earth for roughly two hundred million years.⁷ The Gulf Sturgeon, the specific subject of this litigation, is restricted to the Gulf of Mexico and its tributaries,⁸ feeding primarily in marine habitats and breeding in freshwater.⁹ The species sexually matures between seven and twenty-one years of age, and reaches at least forty-two years of age.¹⁰ Although not well documented, it is believed that they lay their eggs in deep, rock or sandy-bottomed areas, spawning only once every two or three years.¹¹ The sturgeon spends three or four summer months in marine or estuarine water feeding, but eats little during the eight or nine months it spends in the river.¹² The Gulf Sturgeon was formerly sufficient in population to sustain commercial and sport fisheries into the 1970s.¹³

7. Linda Lord, *Guide to Florida Environmental Issues and Information: Chapter 5, Florida's Wetland & Freshwater Ecosystems: The Gulf Sturgeon*, available at <http://www.ficus.usf.edu/docs/guideissues/chap5/chap5-6.htm> (last visited Sept. 2, 2001). Sturgeons have been called living fossils. *Florida's Freshwater Fisheries: Fisheries Updates, Division of Fisheries: Hillsborough River Sturgeon Release*, available at <http://floridaconservation.org/fishing/updates/sturgeon.html> (last visited Jan. 26, 2002).

8. *Orleans Audubon Soc'y v. Babbitt*, No. 94-3510, 1997 U.S. Dist. LEXIS 23909, at *5 (E.D. La. Oct. 28, 1997) [hereinafter *Orleans Audubon Soc'y*]. The Gulf Sturgeon's current range is from eastern Louisiana to northwestern Florida, but formerly ran from the Rio Grande to Florida Bay. At least four different river-specific populations remain. Joseph E. Hightower and Dwayne Fox, *Gulf Sturgeon Spawning Habitat in the Choctawatchee River, Florida/Alabama*, available at <http://www4.ncsu.edu/unity/users/j/jhncsu/public/GSturgeonSpawn.html> (last visited Sept. 2, 2001). Other studies, however, indicate at least five separate populations. Gulf Sturgeon, 63 Fed. Reg. at 9970.

9. *Sierra Club*, 245 F.3d at 436; National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Regional Office, Gulf Sturgeon (*Acipenser oxyrinchus desotoi*), available at <http://www.caldera.sero.nmfs.gov/protect/glfsturg.pdf> (last visited Jan. 26, 2002) [hereinafter NMFS/SERO].

10. Gulf Sturgeon, 63 Fed. Reg. at 9970. Females have a narrower age range, between eight and seventeen years of age. Other studies set the ranges slightly lower. National Oceanic and Atmospheric Administration, National Marine Fisheries, Office of Protected Resources, Gulf Sturgeon, available at http://www.nmfs.noaa.gov/prot_res/species/fish/Gulf_sturgeon.html (last visited Sept. 2, 2001) [hereinafter NMFS/OPR] (indicating maturity ranges of eight to twelve years of age for females and seven to ten years of age for males).

11. NMFS/OPR, *supra* note 10. The Gulf Sturgeon has a strong homing instinct, returning to spawn in the same river every year. See also NMFS/SERO, *supra* note 9.

12. NMFS/SERO, *supra* note 9.

13. Gulf Sturgeon, 63 Fed. Reg. at 9971. Records indicate that the principal fisheries were in western Florida. From 1972 to 1990, Alabama, Mississippi, Florida and Louisiana all enacted laws prohibiting takings of Gulf Sturgeon. *Id.* See also U.S. Fish and Wildlife

The Sturgeon's population crash has been primarily attributed to overfishing,¹⁴ but several factors have contributed to the sturgeon's inability to rebound.¹⁵ In addition to a fishing ban, current conservation efforts include closer scrutiny of river modifications and the use of turtle exclusion devices (TEDs) on Gulf shrimp trawlers.¹⁶

The Gulf Sturgeon was formally listed as a threatened species on September 30, 1991.¹⁷ The listing placed the species under the protection of the Endangered Species Act (ESA).¹⁸ The ESA makes it mandatory that the listing agency designate "critical habitat"¹⁹ for the species.²⁰ Mandatory

Service Division of Endangered Species, Species Accounts: Gulf Sturgeon, *available at* <http://endangered.fws.gov/i/e/sae2w.html> (last visited Sept. 2, 2001).

14. *Sierra Club*, 245 F.3d at 436. *See also* Gulf Sturgeon, 63 Fed. Reg. at 9971-72; Kevin Begos, *Gulf Sturgeon Numbers Are Critically Low*, PANAMA CITY NEWS HERALD, Feb. 28, 1999, *available at* <http://www.newsherald.com/archive/features/wb022899.htm> (last visited Sept. 2, 2001) (FWS officially estimates that approximately 200 fish still inhabit the Apalachicola River, and commenting that "[p]ictures from the turn of the century show sturgeon stacked like cordwood on the docks . . .").

15. *Orleans Audubon Soc'y*, 1997 U.S. Dist. LEXIS 23900, at *37-38. *See also* Gulf Sturgeon, 63 Fed. Reg. at 9971-72. A FWS notice of decision cites the following reasons: the damming of rivers, which prevents upstream spawning and warm weather refuge; dredging and soil disposal, which disrupt rocky bottoms, fill deep water holes, and alter cool water aquifers; contaminants from pesticides and heavy metals, which impair reproduction and normal growth; and the introduction of cultured stocks, which is thought to reduce genetic diversity and introduce disease. Each factor is magnified when considered in conjunction with the time it takes the Sturgeon to reach sexual maturity. *Id.* James R. Morrow, James P. Kirk, K. Jack Killgore, and Howard E. Rogillio, *Recommended Enhancements to the Gulf Sturgeon Recovery and Management Plan Based on Pearl River Studies*, 19 N. AMER. J. FISHERIES MGMT. 1117, 1120 (1999) (observing that populations with very few reproducing individuals would be at a high extinction risk should any deleterious event occur).

16. Louisiana Dept. of Wildlife and Fisheries, *Threatened and Endangered Species: Gulf Sturgeon*, at <http://www.wlf.state.la.us/apps/netgear/index.asp?cn=lawlf&pid=704> (last visited Feb. 4, 2002).

17. Endangered and Threatened Wildlife and Plants; Threatened Status for the Gulf Sturgeon, 56 Fed. Reg. 49,653 (Sept. 30, 1991).

18. 16 U.S.C. §§ 1531-1544 (1994). "The purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for conservation of such endangered and threatened species and to take such steps as may be appropriate to achieve [various] treaties and conventions." *Id.* § 1531(b).

19. Critical habitat is defined as the "specific areas containing features essential to the conservation of the species and that may require special management considerations or protections." *Id.* § 1532(5)(A).

20. *See* *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999) (holding that critical habitat designatin is nondiscretionary.) While generally only encompassing the geographical area actually occupied by a species at the time of listing, it can also include unoccupied areas essential for conservation of the species. 16 U.S.C. § 1532(5)(A)(ii).

critical habitat designation can only be overcome if an agency finds such designation either “not determinable”²¹ or “not prudent.”²² Also, once a species has been listed, any federal agency about to engage in an action that could potentially impact that species must consult with the listing agency.²³ In interpreting the ESA, the United States Supreme Court has held that Congress intended to afford listed species the highest of protection priorities.²⁴

III. THE SUBJECT CASE

A. *Factual Background*

The Pearl River rises in east-central Mississippi and flows southward, forming the Louisiana/Mississippi border, before splitting into the East Pearl and West Pearl Rivers.²⁵ Louisiana’s West Pearl River contains one of the few known remaining stocks of Gulf Sturgeon.²⁶ The listing of those

Unoccupied critical habitat is defined as “specific areas outside the geographical area occupied by the species at the time it is listed” that “are essential for the conservation of the species.” *Id.* Occupied critical habitat is defined as “the specific areas within the geographic area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (i) essential to conservation of the species, and (ii) which may require special management considerations or protection.” *Id.* § 1532(5)(A)(i).

21. 50 C.F.R. § 424.12 (2001). A “not determinable” finding occurs when there is either insufficient information to analyze designation impact, or the biological needs of the species are not well enough known. *Id.* § 424.12(a)(2).

22. *Id.* § 424.12. A “not prudent” finding occurs when the threat of “takes” can be expected to increase because of identification, or because designation would not be beneficial to the species. *Id.* § 424.12(a)(1). “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” in regard to a listed species. 16 U.S.C. § 1532(19).

23. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01. Consultation is necessary to ensure that an agency action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

24. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 176–82 (1978) (holding that the Endangered Species Act prohibited impoundment of the Little Tennessee River by the Tellico Dam; that, through the Act, Congress intended to halt and reverse the trend toward species extinction, whatever the cost; and that Congress made it clear that endangered species are to be accorded the highest priorities). For a brief and concise overview of the Endangered Species Act, see TONY A. SULLENS, *ESA: ENDANGERED SPECIES ACT* (ABA Publishing 2001).

25. Coalition to Restore Coastal Louisiana, *The Pearl River Estuary*, at <http://www.crcl.org/pubs/wise/pearl.htm> (last visited Sept. 3, 2001). The Pearl River is currently one of the five known regional habitats of the Gulf Sturgeon. Gulf Sturgeon, 63 Fed. Reg. at 9970.

26. Gulf Sturgeon, 63 Fed. Reg. at 9970.

stocks triggered a critical habitat designation decision pursuant to the ESA.²⁷ That decision, in the hands of the Secretary of the Department of the Interior, was delegated to both the U.S. Fish and Wildlife Service (FWS) and to the National Marine Fisheries Service (NMFS).²⁸ The Secretary of the Interior, having been handed the determination duty, had one year from the listing date to designate critical habitat, but deferred any decision for two consecutive one-year periods.²⁹ The Orleans Audubon Society filed an action with the U. S. District Court for the Eastern District of Louisiana seeking designation of critical habitat for the Gulf Sturgeon.³⁰ Following discovery, the plaintiffs filed a motion for summary judgment.³¹ At an August 9, 1995 hearing, the defendant FWS did not contest liability, agreed that the FWS had missed the deadline, and stated that it was prepared to act in designating critical habitat for the Gulf Sturgeon.³² The court then ordered the defendant to “take all appropriate action on August 21, 1995.”³³ Between the initiation of the injunction action and the August 9, 1995 hearing, the FWS had circulated a draft decision which proposed actual designation of critical habitat for the Gulf Sturgeon.³⁴

Two weeks after circulating the draft opinion, in an opinion published on August 23, 1995, the FWS did an about-face, finding that such designation was “not prudent” based on a lack of benefit to the species.³⁵ The plaintiffs then attempted to amend their complaint and asked the court to find the FWS in contempt,³⁶ while the defendant moved to dismiss the complaint.³⁷ The court found that the Service had made a good faith

27. 16 U.S.C. § 1532(5)(A)(2001).

28. *Orleans Audubon Soc’y*, 1997 U.S. Dist. LEXIS 23909, at *2 n.1 (citing 50 C.F.R. § 402.01(b)). FWS makes freshwater habitat determinations, while NMFS handles marine designations. *Id.*

29. *Id.* at *6.

30. *Id.*

31. *Id.* at *3.

32. *Id.* at *6.

33. *Id.*

34. *Id.* at *7. The draft order, dated May 22, 1995, stated that designation would provide the species additional protection.

35. Endangered and Threatened Wildlife and Plants: Decisions on Designation of Critical Habitat for the Gulf Sturgeon, 60 Fed. Reg. 43,721 (Aug. 23, 1995).

36. See *Orleans Audubon Soc’y v. Dept. of the Interior*, No. 94-3510, 1996 U.S. Dist. LEXIS 1090, at *1 (E.D. La. Jan. 31, 1996). Plaintiffs argued that the defendant had misapplied the “not prudent” exception, and thus failed to follow the ESA prescription for critical habitat designation. *Id.* at *3.

37. *Id.* at *1. Defendants contended that the designation was lawfully made pursuant to its own regulations, and that the case should be dismissed as moot. *Id.* at *3.

interpretation of the court's order, so no contempt finding was warranted.³⁸ However, the court denied dismissal of the complaint until it could review the FWS findings for appropriateness.³⁹

B. The District Court's October 28, 1997 Decision

The amended complaint alleged that the FWS had relied on only a fraction of the "best scientific data available,"⁴⁰ as well as the prior claim that the "not prudent" decision was based on an improper statutory exception.⁴¹ Reviewing the administrative record under the Administrative Procedures Act (APA),⁴² the court first found that the FWS's interpretation of the ESA was reasonable.⁴³ In so finding, the court first stated that the plaintiffs were incorrect in trying to narrow the prudence exception to merely when detrimental to the species.⁴⁴ The court chose to ignore the legislative history of the ESA and the regulation in favor of the "clear and unambiguous" wording of the statute,⁴⁵ functionally concluding that critical habitat designation must meet a minimum threshold of benefit to the species.⁴⁶ Because the defendants had demonstrated that other laws, projects and cooperative efforts afforded similar or better benefit, the court held that summary judgment for the plaintiffs would be inappropriate.⁴⁷

Further, the court found that the FWS's decision, that jeopardy consultation duplicates critical habitat protection, was reasonable.⁴⁸ The

38. *Id.* at *4.

39. *Id.* at *5. The court allowed the plaintiffs to amend their complaint.

40. *Orleans Audubon Soc'y*, 1997 U.S. Dist. LEXIS 23909, at *3. The author of the FWS decision, Dr. Michael M. Bentzien, stated that the file on the Gulf Sturgeon was voluminous, but that the administrative record was only made up of "non-privileged documents relied upon by the agency in reaching the determination that critical habitat . . . is not prudent." *Id.* at *8 n.3.

41. *See supra* note 34.

42. 5 U.S.C. §§ 701-706 (2001). The APA limits judicial review to the administrative record that was before the agency at the time that the decision was rendered. Such a review is confined to determining whether the action was "arbitrary, capricious, abuse of discretion or otherwise not in accordance with the law." *Id.* § 706(2)(A).

43. *Orleans Audubon Soc'y*, 1997 U.S. Dist. LEXIS 23909, at *23.

44. *Id.* at *27-28. The court saw the regulation as two separate examinations; one occurs when critical habitat designation is actively detrimental to the species, and the other when it is merely not beneficial. *Id.* at *28.

45. *Id.* at *27.

46. "[I]f there is nothing to be gained over and above the status quo, then there is no benefit." *Id.* at *28.

47. *Id.* at *29-30. The court also observed that such a determination was "within the agency's expertise and mission." *Id.* at *29.

48. *Id.* at *30. Jeopardy consultation applies even if no critical habitat designation has

court thus denied the plaintiffs' summary judgment motion, reasoning that the plaintiffs' amended complaint failed to assail the validity of the defining regulation.⁴⁹ The court also deferred to the FWS's interpretation of the ESA and its own regulations.⁵⁰

The court was less deferential regarding the FWS's conclusions and its "best scientific data" support. While admitting that there had been some degree of study, the court found no rational connection between the meager scientific data in the record and the FWS's final decision.⁵¹ "On the contrary, it appears that the Final Decision is based more on the agency's views of the present status of legislation and governmental programs than an evaluation of the best scientific data available."⁵² Thus, the court found that the defendant had failed to consider the best scientific data available, and to rationally connect it to the decision.⁵³ As the court could not order the defendant to designate critical habitat, it was forced to remand the designation to the Service for a review of the best scientific data available.⁵⁴

On February 27, 1998, the FWS decided, on remand, that the critical habitat designation remained "not prudent."⁵⁵ Following a challenge of that

been made, while critical habitat consultation applies only if a critical habitat has been designated. Both processes require federal agencies to consult with the Secretary to ensure that agency action is not likely to jeopardize the continued existence of an endangered or threatened species. *Id.* n.15 (quoting 16 U.S.C. § 1536(a)(2)).

49. *Id.* at *33.

50. *Id.* The court also went one step further, holding that the defendant could reasonably find (although it had not specifically done so), that critical habitat designation would offer no additional protection over the jeopardy standard. *Id.*

51. *Id.* at *35-36.

52. *Id.* at *36. The court also compared the initial draft proposal, at thirty-five pages with fifty-plus citations, to the Final Decision, at thirteen pages and eight citations. Four of the cited studies were missing from the Final Decision administrative record, and none indicated how they would help conserve Gulf Sturgeon habitat. *Id.* at *36-37.

53. *Id.* at *40. In reaching this holding, the court observed that the defendants had "violated the clear mandate of Congress expressed in the ESA" by failing to utilize the best scientific data available. *Id.* at *39.

54. *Id.* at *40.

55. Decision on Designation of Critical Habitat for the Gulf Sturgeon, 63 Fed. Reg. 9967 (Feb. 27, 1998). The Final Decision states specifically that critical habitat consultation applies only to federal agency actions and that federal actions adversely modifying habitat are nearly always found to also jeopardize the species concerned. Thus, the FWS reasoned, critical habitat designation would not impact the outcome of consultation. The only place that it might escape jeopardy consultation would be under unoccupied critical habitat; but since the sturgeon is merely threatened, unoccupied critical habitat would not immediately be required for their survival. *Id.* at 996.

decision, the district court found that The FWS's conclusions were "minimally rational" and supported by the best scientific data available.⁵⁶

C. The Court of Appeals for the Fifth Circuit's Decision

The plaintiffs argued on appeal that the underlying regulation facially conflicted with the ESA, and that as such, the 1998 Final Decision itself was arbitrary and capricious.⁵⁷ They contested the district court's decision on three grounds: first, that the regulation underlying the decision facially conflicted with the ESA, and thus the FWS's decision itself was invalid; second, that the FWS misinterpreted the ESA when it concluded that unoccupied critical habitat was not necessary to threatened species; and third, that the decision was arbitrary and capricious for failing to consider the informational benefits of critical habitat designation.⁵⁸

The court first examined whether the regulation⁵⁹ conflicted with the ESA.⁶⁰ It found that the regulation did not equate the "jeopardy consultation" with the "destruction/adverse modification consultation" standards.⁶¹ However, the regulation did establish a higher consultation threshold than the ESA.⁶² The court then perused the legislative history, finding that Congress had actually chosen to pass over the regulatory definition of "critical habitat."⁶³ The Fifth Circuit observed that 50 C.F.R. § 402.02 would establish a higher consultation standard that would make critical habitat far less likely to be designated.⁶⁴ Such infrequent designa-

56. *Sierra Club*, 245 F.3d at 437-38. The court supported the FWS's decision in spite of recognizing that the regulation on which their reasoning was based, 50 C.F.R. § 402.02, appeared to conflict with the ESA's language. *Id.*

57. *Id.* at 440-41.

58. *See id.* at 440, 444.

59. 50 C.F.R. § 402.02 (2001).

60. *Sierra Club*, 245 F.3d at 440-41. Review of regulations interpreting the ESA falls under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (requiring a court to reverse an agency decision if either clearly contrary to congressional intent, or an impermissible construction of a silent or ambiguous statute). As the plaintiffs did not address the reasonableness of the decision-making process, the court did not need to review the regulation under the APA. *Sierra Club*, 245 F.3d at 441, n.37.

61. *Id.* at 441. The destruction/adverse modification standard is defined in terms of diminishing value of critical habitat, while the jeopardy standard is focused on survival and recovery of the species. *Id.*

62. *Id.* at 441-42. The ESA essentially establishes that the threshold for consultation is merely a threat to recovery, while the regulation requires a danger to both recovery and survival. *See id.*

63. *Id.* at 442-43.

64. *Id.* at 443. An agency would be less likely to have to consult for a "recovery and survival" standard than merely "recovery." That lowered volume of consulting would likely

tion of critical habitat would thus be contrary to, and actually an inversion of, congressional intent.⁶⁵ Thus, the court held that the regulation was facially invalid.⁶⁶

The court then turned to the FWS's decision,⁶⁷ and reviewed the reasonableness of the decision under the APA.⁶⁸ The court first found that the facially invalid regulatory provision⁶⁹ had in fact substantiated the decision to not designate critical habitat.⁷⁰

The court also noted that the FWS erred in reasoning that because a threatened species is not at current risk of extinction, "unoccupied critical habitat would not be immediately required for their survival."⁷¹ Such reasoning, the court observed, would preclude critical habitat designation for all threatened species.⁷² That preclusion could not be reconciled with the provision of the ESA that critical habitat *shall* be designated for both endangered and threatened species.⁷³ The court then concluded that "the 1998 decision was arbitrary and capricious."⁷⁴

In examining the issue of failure to consider informational benefits, the court found that the ESA contained no affirmative requirement of notification when rendering a habitat decision.⁷⁵ The court held that failure

result in a higher volume of "not prudent" findings. *Id.*

65. *Id.* "Not prudent" findings should occur only in rare or limited circumstances. *Id.*

66. *Id.* The court did note, however, that only the definition of "destruction/adverse modification" in 50 C.F.R. § 402.02 was invalid; the remainder of the regulation was still effective. *Id.* at n.61.

67. Decision on Designation of Critical Habitat for Gulf Sturgeon, 63 Fed. Reg. 9967 (Feb. 27, 1998).

68. See *Sierra Club*, 245 F.3d at 444; see also, 5 U.S.C. §§ 701-706.

69. 50 C.F.R. § 402.02 (2001).

70. *Sierra Club*, 245 F.3d at 444-45. Evaluation of critical habitat was based on the premise that "jeopardy consultation was 'functionally the equivalent' to consultation under the destruction/adverse modification standard." *Id.* at 445. That premise was arrived at through the faulty definition in 50 C.F.R. § 402.02, casting the two consultation standards in similar terms. Thus, the functional equation of the two was also flawed.

71. *Id.* at 445.

72. *Id.*

73. *Id.* (emphasis added).

74. *Id.* The court also noted that the FWS's use of the best scientific data available did not overcome the errors induced through the application of 50 C.F.R. § 402.02. *Id.*

75. See *id.* at 446. The ESA contemplated participation of federal and state agencies, as well as private actors, in the designation process. *Id.* at 446, n.79. However, while critical habitat designation does provide outside parties with valuable information, participation is primarily geared to benefit the designating agency in making its determination. The only requirements of the ESA are publication in a local newspaper and the *Federal Register*, notification of state and local governments, and a discretionary consideration to notify such professional scientific organizations as the Secretary deems appropriate. *Id.* at 446, n.80 (citing 16 U.S.C. § 1533(b)(5)). The court does note, however, that in not holding

to consider the informational benefits was not arbitrary and capricious.⁷⁶

Finally, the court concluded that because the FWS had relied on an invalid regulation, the Service's 1998 Final Decision was arbitrary and capricious.⁷⁷ The Fifth Circuit then remanded to the FWS to "reconsider their decision in light of the appropriate legal standards."⁷⁸

IV. DISCUSSION

The holding and observations of the court in *Sierra Club v. U.S. Fish and Wildlife Service* are consistent with similar cases applying the provisions of the ESA to critical habitat designations. The court properly determined that the regulatory definition of the "destruction/adverse modification" standard was facially invalid, as it directly conflicted with the intent and wording of the statute. The court also correctly remanded the decision because it was arbitrary and capricious.

In holding that the regulation was facially invalid, the Fifth Circuit contradicted the lower court, finding that the legislative history should have been consulted for clarification of congressional intent.⁷⁹ The *Orleans Audubon Society* court had originally held that in determining the reasonableness of the "not prudent" decision,⁸⁰ it was unnecessary for the court to consult the legislative history, as the regulation and the ESA were "clear and unambiguous."⁸¹ In so holding, it rejected the Ninth Circuit's reasoning in *Natural Resources Defense Council, Inc. v. Department of Interior*.⁸² In the end, the district court rejected the need to consult the legislative history by deferring to the agency's "expertise and mission."⁸³

In its consideration, the Fifth Circuit implicitly rejected the district court's reasoning, examining the genesis of the language of the regulation

that the FWS should consider informational benefits in every instance, it is in disagreement with the holding of *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998).

76. *Sierra Club*, 245 F.3d at 446.

77. *Id.* at 447.

78. *Id.*

79. *Id.* at 442, n. 51

80. Decision on the Designation of Critical Habitat for the Gulf Sturgeon, 60 Fed. Reg. 43,721 (Aug. 23, 1995).

81. See *Orleans Audubon Soc'y*, 1997 U.S. Dist. LEXIS 23909, at *27.

82. 113 F.3d 1121 (9th Cir. 1997) [hereinafter *Natural Resources Defense Council*]. The court in *Natural Resources Defense Council* utilized legislative history to find that Congress intended the prudence exception to apply only rarely and that the FWS had acted arbitrarily. *Id.* at 1127.

83. *Orleans Audubon Soc'y*, 1997 U.S. Dist. LEXIS 23909, at *29.

as compared to the statute.⁸⁴ Further, the court used the *Natural Resources Defense Council* reasoning to attack the underlying rationale of the agency's 1998 decision.⁸⁵ While on the surface respectful of the lower court's determinations, the Fifth Circuit nonetheless emphatically rejected the *Orleans Audubon Society* court's deference to the agency in favor of determining the intent underlying the ESA.

Both the FWS's 1998 decision and the *Orleans Audubon Society* court's holding represent a very basic misunderstanding regarding the importance of listed species protection. The underlying intent of the ESA must be understood to represent Congress' belief that the protection of listed species is of the highest priority.

In *Tennessee Valley Authority v. Hill*,⁸⁶ the Supreme Court was asked to lift an order enjoining a federal agency from completing a dam project.⁸⁷ In affirming the injunction, the Court consulted the legislative history of the ESA⁸⁸ and determined that Congress intended to devote whatever efforts and resources were necessary to prevent extinction,⁸⁹ irrespective of cost.⁹⁰ In *Sierra Club*, the court cast aside arguments favoring deference to agency decisions, and instead grasped the core purpose of the ESA: the recovery of species and their removal from listing. Thus, the Fifth Circuit's decision squares with Supreme Court precedent.

Tennessee Valley Authority dictates that it is the FWS's duty to do whatever is necessary to bring a listed species back.⁹¹ *Defenders of Wildlife v. Andrus*⁹² seems prescient of that decision. The plaintiffs were attempting to force the FWS to redraft its rules allowing hunting of migratory birds between certain hours.⁹³ The defendant took the position that the ESA only requires that regulations do not jeopardize the continued existence of protected species.⁹⁴ The court found that the FWS had misinterpreted the

84. *Sierra Club*, 245 F.3d at 442-43.

85. *Id.* at 445, n.73. The Fifth Circuit Court quoted the Ninth Circuit and questioned the court's reasoning that designation is not beneficial to a species if it is not of optimal benefit to that species.

86. 437 U.S. 153 (1978).

87. That dam project would have likely eradicated both the Snail Darter habitat and possibly the species itself. *Id.* at 162.

88. *Id.* at 177-84.

89. *Id.* at 177.

90. *See id.* at 174. In this case, the cost was the completion of a multi-million dollar dam project.

91. *Id.* at 180.

92. 428 F. Supp. 167 (D.D.C. 1977).

93. *Id.* at 168-69.

94. *Id.* at 169.

ESA's purpose and requirements,⁹⁵ and declared that, under the ESA, the Service "has an affirmative duty to increase the population of a protected species."⁹⁶

Finally, Congress had intended that instances of no critical habitat designation would be rare. However, in 1992, 546 of 651 listed species were undesignated.⁹⁷ By 1999, only 120 of 1181 listed species had been designated.⁹⁸ The slim percentages of actual designation beg the question of why the Service has been so frugal in critical habitat designation.

The "cost" faced by the *Sierra Club* court in ordering reconsideration of critical habitat for the Gulf sturgeon was neither determined nor immediately determinable. However, cost considerations have played a role in past agency decisions.⁹⁹

The ESA provides that critical habitat designation be made within one year of listing of a species.¹⁰⁰ In *Forest Guardians v. Babbitt*,¹⁰¹ the Secretary of the Interior had twice extended the deadline when plaintiffs moved to compel designation of critical habitat.¹⁰² The defendant cited the congressional spending moratoria as a mitigating circumstance for the requested rejection of the injunction.¹⁰³ While the lower court had deferred to the agency's determination,¹⁰⁴ the Tenth Circuit held that resource limitations were no justification for failure to comply with the mandatory, non-discretionary duties imposed by the ESA.¹⁰⁵

Similarly in this case, budgetary and time constraints likely played a role, albeit tacit, in the delay and refusal to designate critical habitat. When

95. *Id.* The court stated that the Service "must do far more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so." *Id.* at 170.

96. *Id.* at 170.

97. See Thomas F. Darin, *Comment: Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 224 (2000).

98. *Id.*

99. *Id.* at 231-35.

100. 16 U.S.C. § 1533(b)(6)(A) (2001). The agency also has the option of a one-year extension if certain criteria are met. 16 U.S.C. § 1533(b)(6)(C)(ii).

101. 174 F.3d 1178 (10th Cir. 1999) (*amending* *Forest Guardians v. Babbitt*, 164 F.3d 1261 (10th Cir. 1998)).

102. *Id.* at 1182.

103. *Id.* at 1182-83.

104. *Id.* at 1184.

105. See *id.* at 1192. The court stated that it was sympathetic to the Secretary's plight, and praised him for prioritizing to afford the greatest benefit that he could to the species, but nonetheless found his argument of impossibility to perform premature. *Id.* at 1191-93.

such designation is so often immediately necessary, concerns similar to *Forest Guardians* would likely inform the process, whether actually cited or not.

V. CONCLUSION

Critical habitat designation is generally a species' last refuge before extinction. It is critical not only in terms of geography, but also in expediency of the designation. The ESA was crafted for the express purpose of conserving both ecosystems and endangered and threatened species. In keeping with the Supreme Court's holding that listed species have priority over federal agency missions, courts are returning to the notion that the ESA is more than merely statutory paces that the FWS is put through. Rather, it is a congressional mandate that affords listed species the optimal intended federal protections. Courts are often the last line of defense against arbitrary agency decisions, and it is the courts that must hold governmental, public and private parties' feet to the fire to ensure compliance with the ESA.

In that line of progressive, preservationist thinking, *Sierra Club* is a valuable precedent because it reemphasizes the underlying intent and values of the ESA and reverses the trend of courts in deferring to agency decisions. *Sierra Club* makes manifest the mandate of Congress that the ESA is about moving species off the list, not merely maintaining the status quo.

